

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9097

File: 20-461257 Reg: 09071546

7-ELEVEN, INC. and THE ELEVENTH DIMENSION, INC.,
dba 7-Eleven Store 2173 33713A
500 West 7th Street, Los Angeles, CA 90014,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: August 4, 2011
Los Angeles, CA

ISSUED AUGUST 29, 2011

7-Eleven, Inc. and The Eleventh Dimension, Inc., doing business as 7-Eleven Store 2173 33713A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and The Eleventh Dimension, Inc., appearing through their counsel, Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated February 26, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 4, 2008. On July 15, 2009, the Department filed an accusation against appellants charging that, on May 14, 2009, appellants' clerk, Jayantha Dassanayake (the clerk), sold an alcoholic beverage to 19-year-old Erika Faustino. Although not noted in the accusation, Faustino was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on October 28, 2009, and January 12, 2010, documentary evidence was received and testimony concerning the sale was presented by Faustino (the decoy) and by Egwin Guerra and Anthony Suviate, officers with the LAPD.

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants filed a timely notice of appeal in which they raise a single issue: they contend there was no compliance with Rule 141(b)(5)².

DISCUSSION

Appellants contend that no face-to-face identification took place, and that substantial evidence is lacking in the record to support the finding that there was a face-to-face identification in compliance with rule 141(b)(5), because the evidence does not show strict adherence to the terms of that rule as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126].

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations and to the various subdivisions of that section.

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

If any of the requirements of rule 141 are violated, subdivision (c) of the rule provides that the licensee has a complete defense to a sale-to-minor charge.

The facts establish that the decoy identified the clerk three times: once outside the premises, a second time in a whispered voice, and a third time in close proximity to the clerk. The facts are summarized in paragraphs 8 and 9 of the administrative law judge's Findings of Fact:

8. Outside, Faustino spoke to Ofcr. Edwin [*sic*] Guerra. she related the circumstances of the sale and described Dassanayake to him, after which they entered the Licensed Premises. As they were entering, Ofcr. Guerra, in a soft voice, asked Faustino to identify the person who sold her the beer. Faustino responded by pointing to Dassanayake and saying that he did. While she remained near the door, the officers spoke to Dassanayake.

9. Faustino was asked to stand next to Dassanayake. Once again, she was asked to identify the person who sold her the beer. She pointed to Dassanayake and said that he did. A photo of the two of them was taken (Exhibit 3), after which Dassanayake was cited.

The ALJ found in Conclusions of Law 5 that the first two identifications did not satisfy the face-to-face requirement of rule 141(b)(5), but the third one did:

5. . . . While the first identification, outside the store, and the second identification, immediately upon entry, were made outside the presence of Dassanayake, the same cannot be said of the third identification. The third identification, made at a distance of approximately one foot while the clerk was not otherwise engaged, complied with the rule. . . .

In *Chun* (1999) AB-7287 at page 5, the Board defined "face-to-face" to mean:

. . . the decoy and the seller, in some reasonable proximity to each other,

acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

In *7-Eleven/Lo* (2006) AB-8384, the Board also addressed the question of what "face-to-face" means in a case where the appellants' contention was almost exactly the same as that made by appellant here – that the identification was not face-to-face because the photograph shows the decoy and the clerk side-by-side. The Board provided an extensive analysis of the meaning of face-to-face, and concluded that it does not require the decoy and the clerk to be directly facing each other when the identification is made. The important question is whether the clerk knew or should have known that he was being identified as the person who sold alcohol to this minor decoy.

Appellants' argue that the third identification did not comply with rule 141(b)(5) because the clerk needs to acknowledge in some way that he/she is being identified (AOB at p. 7) but this misstates the rule. In *Greer* (2000) AB-7403 at page 4, the Board specifically found that "[t]he minor decoy must identify the seller; there is no requirement that the seller identify the minor, *nor is it necessary for the clerk to be actually aware that the identification is taking place.*" (Emphasis added.) As stated in *Chun, supra*, it is enough that the clerk ought to be knowledgeable that he or she is being accused and pointed out as the seller.

We believe that substantial evidence exists in the present appeal to support the conclusion that there was compliance with rule 141(b)(5) and that the clerk knew or should have known that he was being identified as the person who sold alcohol to this minor decoy.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.